Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

PATRICIA SCOTT,

Petitioner,

v.

CLAY COUNTY, TENNESSEE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Certiorari should be granted to resolve an important issue of federal constitutional law with respect to whether the Sixth Circuit Court of Appeals erred when it entered an opinion giving qualified immunity without a trial even though there were factual issues in dispute which made the order non-appealable.

2. Certiorari should be granted with respect to whether the Sixth Circuit Court of Appeals erred when it dismissed the municipality based upon *City of Los Angeles v. Heller*, 475 U.S. 796, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986), because there can be municipal liability even though the officers individually violate the constitutional rights of the Petitioner or the officers are granted qualified immunity.

3. Certiorari should be granted in light of the Supreme Court's Recent Ruling in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), with respect to whether the Court should revisit the evidence that is genuine and material and how that should be weighed before an appeals court denies a Plaintiff a trial and grants summary judgment on qualified immunity grounds in excess force cases.

PARTIES TO THE PROCEEDING

Petitioner, Patricia Scott, who was plaintiff in the district court and appellee in the Sixth Circuit Court of Appeals, brought an action against the respondents pursuant to 42 U.S.C. § 1983 for violating her constitutional rights.

Respondent Chinn Anderson is the Sheriff of Clay County, Tennessee.

Respondent Billy Pierce was a deputy sheriff of Clay County, Tennessee.

Respondent Michael Thompson is a deputy sheriff of Clay County, Tennessee.

Respondent, Clay County, Tennessee, is a governmental entity created and organized under the laws of the State of Tennessee.

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Petitioner, Patricia Scott, respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in reversing the U.S. Middle District Court of Tennessee's denial of summary judgment to the Respondents and further the Sixth Circuit's dismissal of her cause of action without a trial.

OPINIONS BELOW

Petitioner's suit was filed in the U.S. Middle District of Tennessee, Northeastern Division on November 25, 1995. After discovery, the Respondents moved for summary judgment on the grounds of qualified immunity before a trial. The Motion for Summary Judgment was denied by the District Court Judge Wiseman on July 18, 1998. The Respondents appealed the District Court's opinion to the Sixth Circuit Court of Appeals which reversed the District Court's denial of qualified immunity, granted same and further dismissed all the Plaintiff's federal claims on March 1, 2000. The Petitioner then applied to the Sixth Circuit for an en banc hearing, which was denied on April 13, 2000. The Sixth Circuit opinion (App. A) is reported at *Scott v. Clay County, Tennessee*, 205 F.3d 867 (6th Cir. 2000). The district court opinion (App. B) is not reported.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the Sixth Circuit Court of Appeals entered on March 1, 2000, and its denial of a timely petition for rehearing en banc on April 13, 2000 (App. C).

Petitioner invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> Unreasonable searched and seizures — The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings

On the late evening of April 28, 1995, Patricia Scott was a passenger in her own vehicle, a four door 1978 Chevrolet Caprice when Robert Scott, the driver, failed to stop at an

intersection in Clay County, Tennessee. Deputy Michael Thompson began a chase with Deputy Billy Pierce and Sheriff Chinn Anderson engaging later which lasted approximately twenty (20) minutes. The car came to a stop and turned to return to the path it came to the intersection. The driver sped past Officer Billy Pierce who fired nine (9) shots at the vehicle. Two (2) of the shots hit the passenger, the Petitioner, Patricia Scott. One of which landed in her shoulder and another which is still imbedded in her head and cannot be removed. The car wrecked after the shots were fired and the Petitioner was dragged from the car and handcuffed. Immediately, the Officers realized the Petitioner, Patricia Scott, was wounded and she was taken by life flight to Vanderbilt Hospital.

A lawsuit was filed on November 29, 1995, in the U.S. Middle District Court of Tennessee, Northeastern Division by the Petitioner claiming violations of her constitutional rights.

After discovery and without a trial, on June 1, 1998, the Respondents filed for summary judgment based upon the doctrine of qualified immunity. On July 28, 1998, the U.S. District Court Judge Wiseman denied the motion citing that genuine issues of material fact existed which would require a trial. On August 24, 1998, the Respondents filed an appeal to the Sixth Circuit Court of Appeals. The Sixth Circuit Court filed an opinion on March 1, 2000, overruling the District Court's order and dismissing *all* federal claims. The Petitioner filed a timely petition for rehearing en banc. However, the Petition was denied on April 13, 2000. The Petitioner respectfully requests a writ of certiorari.

B. Statement of Facts

The facts shall be stated as produced by the District Court and Sixth Circuit Court of Appeals. As stated by the Sixth

Circuit in its assessment of the facts, Patricia Scott was a passenger in a car driven by her ex-husband, Robert Scott. The Sixth Circuit has taken the position that she was a willing passenger and a willing participant in the car chase that follows. The Sixth Circuit also places much emphasis on the fact that Patricia and Robert were coming from a "supposed" drug den and were intoxicated.

Robert Scott fails to stop at a stop sign at the intersection of Neely Bend Road and State Hwy. 53 in the opinion of Deputy Michael Thompson. Michael Thompson, deputy decides to follow them and does so by turning around and heading in the direction of the Scott automobile. Eventually a car chase begins with Michael Thompson, Chinn Anderson, and Billy Pierce all at times in pursuit of the Scott car. After about a twenty (20) minute car chase, the Scott car returns to the same intersection where they ran the stop sign. Robert Scott turned left onto State Hwy. 56 and was diverted into the grass along side the highway by Billy Pierce's patrol car. Robert starts the automobile toward the Deputy Pierce's car and drives past. Deputy Pierce fires nine (9) shots at the vehicle. The driver was not hit but the passenger, Patricia Scott, received two (2) bullets, one in her right shoulder and one in her head. The shots that were fired caused the automobile to wreck and it was rushed by the Officers present. The driver, Robert Scott, and the passenger were both thrown to the ground and handcuffed. One of the Officers noticed that Patricia Scott was bleeding severely and she was unhandcuffed, EMTs were called, and eventually she was transported from the shooting scene by helicopter. "life flight" to Vanderbilt University Hospital. She received serious injuries to her head and body. Robert Scott was charged and pled to felonies, but Patricia Scott was never charged with any violations of the law.

Deputy Pierce claimed he wanted to "neutralize the situation" and that he feared that Robert Scott was a threat

to the public although Scott had already passed Pierce and was driving in the grass toward the county road to leave. The Sixth Circuit determined that Deputy Pierce did not know Patricia Scott was in the vehicle and that the shooting was warranted. They further dismissed all federal claims against the deputies, Thompson and Pierce. They granted qualified immunity to Thompson, Pierce and Anderson. Then, the Sixth Circuit dismissed the claims against Clay County, Tennessee.

The district court determined there were issues of facts that were genuine and needed to be tried by a jury. The Sixth Circuit has usurped the role of the jury. They did so, and decided that no material facts remained to be decided, and they reversed the district court's findings. The result is that the Petitioner, Patricia Scott, has been denied her day in court without a trial, and the opportunity to allow a jury to determine if Billy Pierce knew she was in the car.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW WITH RESPECT TO WHETHER THE SIXTH CIRCUIT COURT OF APPEALS ERRED WHEN IT ENTERED AN OPINION GIVING QUALIFIED IMMUNITY TO THE OFFICERS ON SUMMARY JUDGMENT WITHOUT A TRIAL EVEN THOUGH THERE WERE FACTUAL ISSUES IN DISPUTE WHICH MADE THE ORDER NON-APPEALABLE.

The Petitioner, Patricia Scott, respectfully petitions this Court for a Writ of Certiorari to reverse the decision of the Sixth Circuit Court of Appeals which granted the individual officers qualified immunity and dismissed her claims even though the district court found there were material issues of fact that needed to be tried before a jury. The Sixth Circuit

has placed itself into the role of a jury with only the benefit of summary judgment motions and their evidence as their criterion for granting qualified immunity. They say it is a matter of law and have granted qualified immunity to officers in three shooting cases just recently without the benefit of a judge or jury's testing of the credibility of the evidence or witnesses. The dissents in the *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000), this instant case, as well as, in *Boyd v. Baeppler*, 2000 WL 726983 (6th Cir. 2000), speak volumes about the Sixth Circuit ignoring the Supreme Court case of *Johnson v. Jones*, 515 U.S. 304, 132 L. Ed. 2d at 251, 115 S. Ct. 2151 (1995).

Quoting Judge Clay in the dissent of the present case before the Court:

> This Plaintiff, who suffered grievous personal injury and harm in the incident which is the subject of this litigation, should have been permitted to subject the officers' testimony to the truth seeking device of cross-examination at trial, and should have been afforded the opportunity to present direct and circumstantial evidence from which Plaintiff could argue to the court and jury that her clearly established constitutional rights were violated by what constituted, under the circumstances, the officers' excessive use of force for which one or more of Defendants were not entitled to the benefits of qualified immunity.
>
> The majority asserts that because Plaintiff has argued violations of her rights under the Fourth Amendment and not the violation of her substantive due process rights under the Fourteenth Amendment, the lesser standard of "objective unreasonableness" should apply. The granting of summary judgment under the

circumstances of this case is improper regardless of whether the standard that should be applied in evaluating the officers' conduct is the "conscience shocking" standard of the Fourteenth Amendment, see *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 1717 (1998), or the lesser standard of "objective unreasonableness" of the Fourth Amendment. *See Garner*, 471 U.S. at 16-17; *see also Claybrook v. Birchwell*, 199 F.3d 350, 259 (6th. Cir. 2000). Regardless of the appropriate standard, Defendants do not dispute, as made clear by the district court's opinion, that Plaintiff's right to be free from excessive force under the Fourth Amendment was a clearly established right at the time of the incident in question. The question that should have been left for trial was whether excessive force was actually employed against Plaintiff.

This Circuit's unfortunate practice of arrogating unto itself the role of resolving on appeal the factual disputes presented by a qualified immunity defense in § 1983 action, as represented by the majority opinion herein, constitutes the troubling trend followed by this Court in the improperly decided case of *Claybrook v. Birchwell. See* 199 F.3d at 358-61 (affirming the district court's order granting summary judgment to the defendants on Counts III or IV of the plaintiffs' complaint). I therefore dissent.

Quoting Judge Daughtrey in the dissent of *Boyd v. Baeppler*, 2000 WL 726983 (6th Cir. 2000):

The majority awards summary judgment to officers Baeppler and Wilsman because it finds, as a matter of law, that Adolph Boyd posed a threat

to their safety that made the use of deadly force objectively reasonable. In so doing, the majority discounts the plaintiff's evidence suggesting the existence of genuine issues of material fact that should, under *Johns v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), preclude our assertion of jurisdiction here. Because I believe that our court lack jurisdiction to decide this appeal, at the very least to defendant Baeppler, and therefore that our decision today preempts the jury's role in deciding the sufficiency of the plaintiff's evidence, see *Behrens v. Pelletier*, 516 U.S. 299, 313, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), I must respectfully dissent.

Today the majority holds otherwise, and its decision continues the unfortunate trend noted by other members of this court of a panel "arrogating unto itself the role of resolving on appeal the factual disputes presented by a qualified immunity defense in a § 1983 action." *Scott v. Clay County*, 205 F.3d 867, 881 (6th Cir. 2000) *(Clay, J., dissenting) (citing Claybrook v. Birchwell*, 199 F.3d 350, 359-60 (6th Cir. 2000)). Because I believe that the record supports the district court's conclusion that genuine disputes remain regarding whether the defendants' conduct was reasonable, I therefore dissent.

The District Court denied the Respondents' Motion for Summary Judgment, and such decision is, of course, subject to *de novo* review. In *Johnson v. Jones*, 515 U.S. 304, 132 L. Ed. 2d at 251, 115 S. Ct. 2151, a unanimous Court held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."

In determining whether qualified immunity protected appellants, the district court had to determine whether (1) plaintiff identified a clearly established right alleged to have been violated; and (2) whether a reasonable police officer in defendants' position should have known that his conduct violated that right. *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 999 (6th Cir. 1994). The district court clearly found and the Respondents conceded that the Petitioner had established a violation of a clearly established right under the Fourth Amendment to be free from the use of excessive force.

Ordinarily, the qualified immunity defense fails once the right of the public official is alleged to have violated is determined to be clearly established at the time of the incident. Having found a violation of a clearly established right the District Court then conducted a "fact specific" analysis to determine the "objective legal reasonableness" portion of the qualified immunity claim.

We respectfully submit that the panel majority erroneously decided all factual disputes against the Petitioner, who is the non-moving party. It is undisputed that the Petitioner's right to be free from the use of excessive force under the Fourth Amendment was clearly established at the time of the incident in question. "It is the province of the jury, *not the court*, to decide on the credibility of the defendant's account of the need for force." *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994), quoted in *Secot v. City of Sterling Heights*, 985 F. Supp. 715 (E.D. Mich. 1997). Therefore, the issue of whether the use of force in the seizure was objectively reasonable is a question of essential material fact for a jury to decide.

Looking to the dissent of Judge Clay and Daughtrey, it is clear that when combined with the ruling in *Johnson v. Jones*, the granting of qualified immunity to the officers

before trial was clearly erroneous, and the Petitioner should be afforded a trial. The Sixth Circuit *took* jurisdiction and made jury determinations of fact. A jury, not a court, should have decided the questions they chose to decide. They further decided "material" issues of fact without jurisdiction.

Since there are factual issues as to whether the Defendants-Appellants' use of force was justified or excessive, the district court order denying them qualified immunity is not immediately appealable. *Johnson v. Jones*, *supra*; *Mitchell v. Forsyth*, *supra*, at 512. The order denying these Defendants-Appellants a summary judgment is a final order under 28 U.S.C. § 1291. Therefore, this Court lacks jurisdiction, the appeal should be dismissed and the order reversing and dismissing all the Defendants vacated.

II. CERTIORARI SHOULD BE GRANTED WITH RESPECT TO WHETHER THE SIXTH CIRCUIT COURT OF APPEALS ERRED WHEN IT DISMISSED THE MUNICIPALITY BASED UPON *CITY OF LOS ANGELES v. HELLER*, 475 U.S. 796, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986), BECAUSE THERE CAN BE MUNICIPAL LIABILITY EVEN THOUGH THE OFFICERS INDIVIDUALLY VIOLATE THE CONSTITUTIONAL RIGHTS OF THE PETITIONER OR THE OFFICERS ARE GRANTED QUALIFIED IMMUNITY.

The Sixth Circuit states that the Petitioner had stated a proper case against Clay County, Tennessee. However, since they had found no civil rights violation on the part of the individual officers, they had to dismiss the claims against Clay County, Tennessee based on *City of Los Angeles v. Heller*, 475 U.S. 796, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986).

Without conceding that the conduct of the individual officers did not rise to the level of a constitutional violation, the Petitioner would submit that a finding that the individual officers violated the civil rights of the Petitioner is not a prerequisite to a finding of municipal liability. If a finding of a court that an officer has not committed a civil rights violation and is granted qualified immunity automatically dismisses the municipality (County), then *Monell v. Department of Social Services*, 436 U.S. 658, and *Owen v. City of Independence*, 445 U.S. 622 has not affect. *Monell* and its progeny stand for the proposition that a municipality should be liable when it is "at fault" or the "moving force" behind a constitutional violation.

In the instant case, Deputies Pierce and Sheriff Anderson ultimately joined Deputy Thompson in the pursuit along Highway 53 even though *it was against departmental policy that no more than two (2) patrol vehicles be in direct pursuit of a suspect vehicle*. Furthermore, Sheriff Anderson admits at one point that he radioed to "*back-off and give them a chance to stop.*" The Defendants-Appellants' failure to obey a direct order from the Sheriff demonstrates the lack of discipline and training on the part of the deputies. The Sheriff also testified that he would not condone a vehicle pursuit of a misdemeanor suspect.

The Defendants admit that they communicated to each other over radios throughout the entire incident. Although the Defendants deny that they knew the identity of the driver, there still remains a question of fact as to whether during this pursuit they recognized the car, the identity of the driver and whether there was a passenger.

The Sheriff, Chinn Anderson is the policy maker, and admits that Pierce violated policies of his department in that more than two (2) cars were in the chase, and a car chase

should not have occurred over a misdemeanor traffic violation. He even told them to back off.

It is undisputed that a citizen's right to life is of constitutional dimension and is protected by the U.S. Constitution. When a municipality deprives a citizen of his constitutional right to life by maintaining policies, practices or customs in deliberate indifference to this right to life, the municipality is directly liable for violating the citizen's civil rights. The court's opinion — that they cannot be liable for violating the Petitioner's civil rights because the individual officers were entitled to qualified immunity — is misplaced. Qualified immunity is designed to protect individual defendants from personal money judgments if the officer's conduct was objectively reasonable in light of the officer's departmental training and clearly established law. Qualified immunity is not applicable to municipalities and is not designed to protect police departments from the consequences of their own culpable conduct and improper training. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

Based on the record, there are numerous genuine issues of material fact regarding whether the policies, practices and customs of Clay County, Tennessee were deliberately indifferent to the constitutional right to life of the Petitioner and whether those policies, practices and customs were the proximate cause of Petitioner's injuries.

Accordingly, the Petitioner would submit that the supervision and discipline of the officers of the Clay County Sheriff's department is woefully inadequate and created an atmosphere where officers could violate the policies and training of the Clay County Sheriff's Department without fear of discipline. Despite all the transgressions of the officers, none of them faced any discipline.

In *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), the Supreme Court established that local governmental entities can be held liable under § 1983 for violating an individual's constitutional rights. *Id.* at 690. Shortly after *Monell*, the Supreme Court recognized that constitutional injury does not necessarily derive from the conduct of any one municipal employee. Instead, the Court has acknowledged the existence of " 'systemic' [constitutional] injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith." *Owen v. City of Independence*, 445 U.S. 622, 652 (1980).

To establish municipal liability under *Monell*, a plaintiff must show (1) the existence of a municipal policy or custom, and (2) that there is a causal link between the policy or custom and an alleged constitutional deprivation. *See City of Canton v. Harris*, 489 U.S. 378, 385 (1989). In a "failure to train" case against a municipality, a plaintiff bears the burden of proving that the municipality was deliberately indifferent to the risk of injury stemming from its failure to train. As the Supreme Court stated in *City of Canton v. Harris*, *supra*:

We hold today that the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to **deliberate indifference to the rights of persons with whom the police come into contact**. . . .

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need. **In that event,**

> **the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.**

Id. at 388-390 (emphasis added).

Pursuant to *Canton*, when a municipality is deliberately indifferent to the risk of death or serious injury caused by its failure to train its officers, the municipality may be directly liable for any death or injury sustained at the hands of the municipality's untrained officers.

It is clear that a municipality is not protected by the doctrine of qualified immunity. As the Supreme Court noted in *Owen v. City of Independence*, 445 U.S. 622 (1980):

> [W]e can discern no "tradition so well grounded in history in history and reason" that would warrant the conclusion that in enacting § 1983, the 42nd Congress *sub silento* extended to municipalities a qualified immunity based upon the good faith of their officers. *Id.* at 650.

Further, the federal courts have consistently held that a municipality still faces liability for civil rights violations even though the individual officers were entitled to qualified immunity. *See Dodd v. City of Norwich*, 815 F.2d 862, 868 (2nd Cir. 1987); *Palmerin v. City of Riverside*, 794 F.2d 1409, 1415 (9th Cir. 1986); *Doe v. Sullivan County, Tenn.*, 956 F.2d 545, 554 (6th Cir. 1992); *Munz v. Ryan*, 752 F. Supp. 1537, 1551 (D. Kan. 1990); *Sunn v. City & County of Honolulu*, 852 F. Supp. 903, 907 (D. Haw. 1994) ("The circuits which have considered the issue have held that *Heller* is inapplicable to cases where police officers are exempt from suit on qualified immunity grounds"). Accordingly, Clay County is not protected by qualified immunity. Further, the finding that

the individual officers were entitled to qualified immunity does not preclude the consideration of whether the municipality is directly liable for violating Patricia Scott's constitutional right to life.

Finally, even if this Court finds that individual officers did not violate the constitutional rights of the Petitioner, such a finding is not a prerequisite to a finding of municipal liability. Petitioner submits that municipal liability under 42 U.S.C. § 1983 can be established even though the conduct of any one municipal employee may have violated a citizen's constitutional rights. If a municipality could not be liable unless there was a finding that an individual officer violated the constitutional rights of the citizen, a municipality would escape liability in precisely the circumstances where the municipality is most at fault. The Petitioner submits such a result is inconsistent with the remedial and deterrent policies of 42 U.S.C. § 1983.

The Plaintiff submits that the authorities cited above control under the facts of the instant case and illustrate that a municipality **can** be independently liable for violating a person's constitutional rights without the requirement that an individual officer be shown to have violated the constitutional rights of the Plaintiffs. The Supreme Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), does not require a finding of a constitutional violation by an individual employee as a condition precedent to municipal liability.

In *Heller*, the Supreme Court held that the district court properly dismissed the municipality following a jury verdict in favor of the individual officer. The Court noted that the municipal defendants "were sued ***only*** because they were thought legally responsible for [the police officer's actions." *Id.* 475 U.S. at 799 (emphasis added). Accordingly, "if the latter inflicted no constitutional injury on [the plaintiff], it

is inconceivable that [the municipal defendants] could be liable to [the plaintiff]." *Id.*

Properly construed, *Heller* merely stands for the proposition that municipal liability cannot be established if exoneration of the individual defendants necessarily means that the plaintiff's constitutional rights were not violated. In *Heller*, exoneration of the individual officer necessarily meant no constitutional violation occurred since the municipal defendants were sued only because they were thought to be derivatively [*i.e.* vicariously] liable for the police officer's actions.

Heller has been harshly criticized by the commentators. *See* 1 M. Schwartz & J. Kirklin, supra, § 7.6 at pp. 346-47; *see also* 1 M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees*, § 7.6 at p. 346 (2d Ed. 1991) (*Heller* should not be extended beyond those circumstances in which "the theory of city liability is based upon its responsibility for the particular officer's allegedly unconstitutional conduct."); Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 Geo. Wash. L. Rev. 417, 422, 459 (Jan. 1992) ("Such a result . . . undermines Section 1983 by insulating municipalities from liability when they are most at fault — when their policies and customs most directly cause their agents to violate constitutional rights . . . A requirement that municipal liability be derived from individual liability would undermine [*Monell* and its progeny] by immunizing municipalities from liability in many cases in which they were actually responsible for the violations."); and Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 Hastings L.J. 499, 540-41 (March 1993) ("such a[n] application of *Heller* would result in a near-complete evisceration of civil rights remedies against municipalities.").

To rule that Clay County could not be independently liable for violating the Petitioner's civil rights without a finding that the individual officers violated their constitutional rights would be a departure from the basic tenets of *Monell* and its progeny that a municipality should be liable when it is "at fault" or the "moving force" behind a constitutional violation. *See Monell*, 436 U.S. at 694; *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818 (1985) (*Monell* provided a "fault-based analysis for imposing municipal liability"). Pursuant to *Canton*, a municipality may be liable for violating the constitutional rights of a victim if the municipality is deliberately indifferent to the risk of injury to the public caused by its failure to train its officers. The Petitioner submits that this result is consistent with the purposes of 42 U.S.C. § 1983 which requires that a party be "at fault" before violating a person's constitutional rights.

If the ruling in the present case is allowed to stand, then any time an individual officer is granted qualified immunity by the Court, the municipality can *never* be found liable for violation of an individual civil rights. A ruling of this nature would defeat the above mentioned case. Surely the United States Supreme Court did not intend this result when it decided *Heller*. This confusion needs to resolved by this Court in this case.

III. CERTIORARI SHOULD BE GRANTED IN LIGHT OF THE SUPREME COURT'S RECENT RULING IN *REEVES v. SANDERSON PLUMBING PRODUCTS, INC.*, 120 S. Ct. 2097 (2000), WITH RESPECT TO WHETHER THE COURT SHOULD REVISIT THE EVIDENCE THAT IS GENUINE AND MATERIAL AND HOW THAT SHOULD BE WEIGHED BEFORE AN APPEALS COURT DENIES A PLAINTIFF A TRIAL AND GRANTS SUMMARY JUDGMENT ON QUALIFIED IMMUNITY GROUNDS IN EXCESSIVE FORCE CASES.

The recent ruling of this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, should be extended to civil rights cases whether there is a possibility of qualified immunity. Since qualified immunity should not be applied to municipalities and they should and can be held liable if their policies are the "moving force" or "cause" of a civil rights violation, should not a Plaintiff be entitled to a trial just as a Plaintiff in the private sector. A.D.E.A. is entitled to one.

In *Reeves*, the Court states,

> . . . we reasoned that is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the prima facie case, sufficient to show intentional discrimination. Thus, rejection of the defendant's proffered reason will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Id.* at 511, 113 S. Ct. 2742. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the

> explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilty."

The Sixth Circuit impermissible substituted its judgment concerning the weight of the evidence for the jury's. The Sixth Circuit when deciding a qualified immunity motion are suppose to look at the evidence most favorably in light of the non-movant. How can they look to the eyes of the defendant when asked a question on cross? Further, whey should a governmental entity be treated differently if the City if a "person" for § 1983 purposes and responsible for its own actions.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED MARCH 1, 2000

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 98-6157

PATRICIA SCOTT,

Plaintiff-Appellee,

v.

CLAY COUNTY, TENNESSEE; CHINN ANDERSON; BILLY PIERCE; MICHAEL THOMPSON,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Tennessee at Cookeville.
No. 95-00095 — Thomas A. Wiseman, Jr., District Judge.

Argued: August 10, 1999

Decided and Filed: March 1, 2000

Before: KRUPANSKY, BOGGS, and CLAY,
Circuit Judges.

* * *

Appendix A

KRUPANSKY, J., delivered the opinion of the court, in which BOGGS, J., joined. CLAY, J. (pp. 21-23), delivered a separate dissenting opinion.

OPINION

KRUPANSKY, Circuit Judge. The defendants-appellants Clay County, Tennessee ("the County"), Sheriff Cecil "Chinn" Anderson ("Anderson"), Deputy Billy Pierce ("Pierce"), and Deputy Michael Thompson ("Thompson") have contested the district court's denial of their motion, anchored in qualified immunity, for Fed. R. Civ. P. 56 summary adjudication of the federal civil rights claims of the plaintiff-appellee Patricia Scott ("Patricia" or "the plaintiff"). The plaintiff alleged in her single-count complaint that Clay County Sheriff's Department officers Anderson, Pierce, and Thompson used excessive force to effect her arrest, in violation of 42 U.S.C. §§ 1983 and 1988,[1] which

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1. Section 1983 provides, in pertinent segment:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

In any action under section 1983, the plaintiff must prove that (1) he or she has been deprived of a right secured by the United States constitution or laws, (2) the defendants who allegedly caused

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caused her serious bodily injury. She further contended that the County, and Anderson as County Sheriff, failed to properly train and/or supervise the defendant deputies, and failed to develop and implement appropriate official departmental policy restraints against the unjustifiable exertion of potentially lethal force, thus violating constitutional rights redressible by § 1983. Patricia also asserted pendent state law claims.

Although witness unanimity is absent regarding various factual details, the essential controlling material facts of this case are not in substantial dispute.[2] During the late evening

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that deprivation acted under color of state law, and (3) the deprivation occurred without due process of law. *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 995 (6th Cir. 1994).

Section 1988, *inter alia*, authorizes the court, in its discretion, to award attorney fees to certain prevailing parties in section 1983 cases.

2. In accordance with long standing summary judgment norms, this reviewing court has construed the record evidence most favorably for the plaintiff Patricia Scott as the litigant opposing summary judgment. *E.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) (citation omitted). *See also Eastman Kodak v. Image Technical Services*, 504 U.S. 451, 456 (1992); *Adams v. Metiva*, 31 F.3d 375, 378-79 (6th Cir. 1994). For purposes of this
(Cont'd)

of April 28 and early morning of April 29, 1995, Patricia Scott had been a willing passenger in her own automobile, a four-door 1978 Chevrolet Caprice, traveling on the dark country roadways of Clay County. She had permitted her ex-husband, Robert Scott ("Robert"), to drive the vehicle. Moments earlier, her former spouse had retrieved her from a nearby narcotics den known locally as "Chet's."[3] Patricia knew that her activities at the drug house had infuriated Robert; he testified that he "was probably the maddest I ever was in my life." Moreover, Patricia knew that Robert had proximately ingested a significant volume of alcohol coupled with additional psychoactive substances;[4] possessed no valid motor vehicle operator's permit because his license had been judicially revoked pursuant to his conviction for driving while intoxicated; and had, in the past, recklessly fled from law enforcement authorities at high speeds. Forthwith, the emotionally agitated, and chemically impaired, couple engaged in a passionate argument inside the moving vehicle.

(Cont'd)
appeal, the defendants-appellants either have relied upon facts which were conceded by the plaintiff-appellee or were proved beyond dispute; or have adopted the plaintiff's version of contested material facts, as articulated via her written response to the defendants' Statement of Material Fact Not in Dispute filed in support of their summary judgment motion.

3. Both Scotts had a history of cocaine abuse, although Robert asserted that he had been attempting to overcome his cocaine dependency.

4. Robert testified that he had recently consumed between five and seven beers, in tandem with prescription pharmaceuticals including "nerve medicine" and "muscle relaxants," which had produced a drug-induced mood alteration.

Appendix A

Flouting a traffic sign, Robert failed to stop at the intersection of Neely's Creek Road and Highway 53. Sheriff's Deputy Michael Thompson, on routine highway patrol, observed the Scott vehicle race erratically through that intersection with its tires squealing, then momentarily weave off the pavement as it recklessly turned, at a hazardous velocity, onto Walker Ridge Road. Thompson, concerned for public safety, commenced tailing that motorcar.

The speed of the Scott automobile dangerously rose while on Walker Ridge Road, rocketing past, and narrowly missing, Sheriff Chinn Anderson's unmarked service cruiser which he had parked near the roadside, as well as the sheriff himself, who had been sitting nearby. In response, Thompson, with his vehicle's siren sounding and blue lights flashing, pursued the Caprice at high speed.[5] Because he lacked a valid driver's license, Robert intended to evade apprehension by fleeing to his mother's residence. An experienced "road runner," Robert had successfully eluded the police in past high-speed chases. Robert conceded that, during his ensuing flight, he forced at least one fellow motorist off the roadway, and that he "might have been across the yellow line or could have been sliding across the yellow line," which conduct patently risked the physical safety of civilian motorists and pedestrians, pursuing patrolmen, Robert's passenger, and himself.

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5. At deposition, Thompson could not recall whether he activated his unit's siren and lights shortly before, or momentarily after, the Scott vehicle sped perilously close to the sheriff and his vehicle.

Appendix A

Patrol cruisers driven by Anderson and Deputy Sheriff Billy Pierce momentarily joined Deputy Thompson's pursuit of the speeding Chevrolet. After the three sheriff's office units had chased the Scott car for over twenty minutes, at speeds ranging between 85 to 100 miles per hour, Robert lost control of his vehicle while attempting a sharp turn at 75 to 80 miles per hour. The Caprice skidded for several hundred feet, glided off the thoroughfare, and crashed into a roadside guard rail, which brought the fugitive vehicle to an abrupt halt.

Deputy Pierce, whose patrol vehicle had led the erstwhile chase, initially reached the immobilized motorcar. At some point, a collision transpired between the Scott automobile and Pierce's departmental vehicle; Robert asserted that Pierce's car struck the stationary Caprice from the rear, whereas Pierce posited that Robert backed the Caprice into his squad cruiser after he (Pierce) had exited it. In any event, no dispute exists that Deputy Pierce parked and exited his patrol car, produced his sixteen-round, nine-millimeter Ruger service arm, and cautiously moved toward the now-stationary Chevrolet. Suddenly, the Chevrolet rapidly accelerated forward, compelling Pierce to leap out of its path in self-defense. Then, in an apparent bid by its driver to return to the highway, the Caprice proceeded directly towards Deputy Thompson's approaching vehicle. Robert recalled that, although he had observed at least one firearm-toting deputy approaching the Caprice, and knew that additional armed law enforcement officers were approaching, he nevertheless intended to escape by driving in the direction from which the supporting units would be arriving.

Appendix A

At the moment that the Chevrolet was racing once again onto the public motorway, Deputy Pierce believed that its operator had earlier tried to run down Sheriff Anderson,[6] had attempted to drive over him (Pierce) only moments previously, and posed a grave immediate menace to the lives and limbs of his approaching colleagues as well as innocent highway travelers. The plaintiff has not contested Pierce's avowal that he did not know that a passenger was also inside the vehicle. Confronted with a momentous, split-second, life-or-death decision, defendant Pierce initially reacted by firing five bullets towards the Chevrolet's driver;[7] he then discharged an additional four rounds at that vehicle's tires,

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6. Pierce had learned of Robert's near collision with Anderson via radio transmissions from Anderson and Thompson. The three defendants had maintained radio contact throughout the chase.

7. Pierce testified that he did not intend to kill the driver; rather, he simply "intended to neutralize the situation."

Beyond contradiction, Robert's pattern of wanton misdeeds posed a serious and imminent threat of death or other dire irreparable consequences, which necessitated an immediate and decisive counteraction. In addition to the evidence evolved above, the record reflected that, on November 4, 1996, the Criminal Court of Clay County, Tennessee, convicted Robert, following his guilty pleas, on two counts of felony reckless endangerment, one count of felony aggravated assault, and one count of misdemeanor evasion of arrest, stemming from his actions on the morning of April 29, 1995. Furthermore, at deposition on February 18, 1997, Robert confirmed his unstable mental state on the implicated morning; when queried if, during the high speed chase, he had considered that if he continued to flee that a pursuing officer might shoot, Robert replied, "At the time, I didn't care if I lived or died."

causing it to skid to a stop for the second, and final, time. Pierce's hail of bullets had failed to injure the driver, Robert Scott. Unfortunately, however, two of his shots had inadvertently struck plaintiff Patricia Scott, whose presence as a passenger was unknown to Pierce.

Immediately following the Chevrolet's incapacitation, additional officers, including Anderson and Thompson, arrived at the scene. Robert and Patricia were then removed from the vehicle and manacled. However, instantly upon perceiving that Patricia had been wounded, they radioed for a medical evacuation helicopter. The rescue aircraft rushed Patricia to Vanderbilt University Hospital, where doctors discovered one bullet lodged inside her skull and a second gunshot imbedded within her right shoulder. Patricia has alleged that she has suffered significant physical damage, including lifelong adverse health consequences, caused by her injuries and by the permanent presence of the bullet in her skull. Patricia Scott states that the bullet cannot be surgically removed.

On November 29, 1995, Patricia instigated her instant complaint, in which she advanced claims under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution,[8] as enforced by 42 U.S.C. §§ 1983 and 1988

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8. The Fourth Amendment posits, in relevant part, that "The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated[.]" U.S. Const. amend. IV.

The Fifth Amendment states, in material part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law [.]" U.S. Const. amend. V.

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(*see* note 1 above), alleging that Pierce, Thompson, and Anderson, in their personal as well as official capacities, had committed, participated in, and/or failed to prevent, the unconstitutional use of excessive force to seize her; and that Sheriff Anderson and the County had failed to properly train and/or supervise the defendant deputies in, and/or devise and implement appropriate policies defining, the lawful application of force to effect an arrest. Additionally, the plaintiff joined pendent Tennessee constitutional and tort law claims. Patricia has sought $10 million in compensatory damages, an additional $5 million in punitive damages, attorney fees and other litigation expenses, an injunction restricting the defendants' forcible arrest practices, and other appropriate relief.

Following discovery, on June 1, 1998, the four defendants jointly petitioned the district court for a summary judgment under Fed. R. Civ. P. 56 dismissing the plaintiff's federal civil rights claims, as well as the dismissal, for want of federal subject matter jurisdiction, of her pendent

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The Fourteenth Amendment stipulates, in pertinent segment, that "No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

The Fourteenth Amendment's Due Process Clause restricts the activities of the states and their instrumentalities; whereas the Fifth Amendment's Due Process Clause circumscribes only the actions of the federal government. *See generally Sturgell v. Creasy*, 640 F.2d 843, 850 (6th Cir. 1981); *Walker v. Hughes*, 558 F.2d 1247, 1257 (6th Cir. 1977). *Ergo*, the instant complainant's citation to the Fifth Amendment Due Process Clause was a nullity, and redundant of her invocation of the Fourteenth Amendment Due Process Clause.

Tennessee law claims. Basing their motion on the doctrine of qualified immunity,[9] the defendants argued that the

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9. "Qualified or 'good faith' immunity is an affirmative defense that is available to government officials performing discretionary functions." *Rich v. City of Mayfield Hts.*, 955 F.2d 1092, 1094 (6th Cir. 1992). "The ultimate burden of proof is on the *plaintiff* to show that the defendants are *not* entitled to qualified immunity." *Id.* at 1095 (emphases added). The Sixth Circuit, *en banc*, has recently defined the components of the qualified immunity defense:

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known. The procedure for evaluating claims of qualified immunity is tripartite: First, we determine whether a constitutional violation has occurred; second, we determine whether the right that was violated was a clearly established right of which a reasonable person would have known; finally, we determine whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

Williams v. Mehra, 186 F.3d 685, 691 (6th Cir. 1999) (*en banc*) (quotations omitted; brackets added) (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Dickerson v. McClellan*, 101 F.3d 1151, 1157-58 (6th Cir. 1996)).

The insulation from federal civil rights litigation bestowed upon state governmental personnel by qualified immunity sweeps broadly, affording them " 'ample room for mistaken judgments' by protecting

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evinced facts, even when construed most favorably for the claimant, could not, as a matter of law, support the conclusion that any defendant had violated any federal constitutionally-protected right; or, alternatively, assuming *arguendo* that the evidence adverse to the movants was legally sufficient to sustain a hypothetical rational jury's finding of a constitutional infraction, the defendant law enforcers should nevertheless be shielded from personal liability because the offended right was not "clearly established" on April 29, 1995. *See, e.g., Painter v. Robertson*, 185 F.3d 557, 566-67 (6th Cir. 1999).

On July 28, 1998, the trial court denied the subject motion, ruling that material issues of fact remained, for juror resolution, regarding the Fourth Amendment "reasonableness" of the plaintiff's seizure (evolved below); and, if the seizure was unreasonable, whether the precise contributing actions of each individual defendant were objectively unreasonable under the dictates of law which was clearly established on the incident date. On August 24, 1998, the defendants noticed a timely appeal to this reviewing bench.

Ordinarily, a trial forum's rejection of a summary judgment motion is not subject to appellate scrutiny, irrespective of whether that motion had ultimately posed a

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'all but the plainly incompetent or those who knowingly violate the law.' " *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 902 (6th Cir. 1998) (*quoting Hunter v. Bryant*, 502 U.S. 224, 229 (1991)). *See also Megenity v. Stenger*, 27 F.3d 1120, 1124 (6th Cir. 1994) ("If we conclude that a reasonable public official would not have been aware that he was committing a [federal civil rights] violation, we then afford immunity.") (brackets added).

legal or a factual question. However, a district court's dismissal of a civil rights defendant's summary disposition application *anchored in qualified immunity* will be immediately appealable if no predicate finding of an essential material fact remains for jury determination, and thus the lynchpin issue is purely legal. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *Johnson v. Jones*, 515 U.S. 304, 309-12 (1995). That judicial exception to the governing norm prevails because, if a defendant public servant is personally immunized from monetary liability as a matter of law, he or she is entitled to "an *immunity from suit* rather than a mere defense to [ultimate] liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (italics in original; brackets added).

In the cause *sub judice*, although the adversaries disputed multiple factual issues in the trial court, none of those disputed facts were *essential* to the qualified immunity defense. *See* Fed. R. Civ. P. 56(c) (directing that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to a judgment as a matter of law.") (emphases added). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."[10] *Anderson v.*

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10. The *Anderson* Court explained:

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that

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Liberty Lobby, 477 U.S. 242, 247-48 (1986) (emphases in original).

Accordingly, a lower court's determination that defendant state employees were not shielded by qualified immunity, with reference to a set of undisputed operative facts, is a "final decision" of law,[11] and thus is immediately appealable under 28 U.S.C. § 1291.[12] *Mitchell*, 472 U.S. at

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> might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986) (citation omitted).

11. All legal conclusions by lower courts, including those posited in resolving a summary judgment motion anchored in qualified immunity, are scrutinized *de novo*. *E.g.*, *Grider v. Abramson*, 180 F.3d 739, 746 n.7 (6th Cir.), *cert. denied*, 120 S. Ct. 528 (1999); *Brennan v. Township of Northville*, 78 F.3d 1152, 1154, 1156 (6th Cir. 1996).

12. The Sixth Circuit has recently clarified the factors which inform an appellate court's jurisdiction to review a district court's denial of qualified immunization on summary judgment:

> If the defendant does not dispute the facts alleged by the plaintiff for purposes of the appeal, our jurisdiction is clear. If, instead, the defendant disputes the plaintiff's version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts

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530. That principle controls even if the trial judge had erroneously concluded that genuine issues of material fact had to be initially resolved by the trier of fact to assess the qualified immunity defense. *See Williams v. Mehra*, 186 F.3d 685, 689-90 (6th Cir. 1999) (*en banc*) ("*regardless of the district court's reasons* for denying qualified immunity, we may exercise jurisdiction over the appeal to the extent it raises questions of law.") (italics in original; ellipse omitted) (*quoting Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996)).

Constitutional tort claims against state actors undergirded by allegations of excessive force exerted to consummate a person's seizure are properly assessed under Fourteenth Amendment due process guarantees if the plaintiff had been a *non-targeted innocent third party* collaterally injured by an assertion of official force; in such instances, the defendant will be liable only if he or she had acted in a manner which "shocks the conscience."[13] *County*

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> to the plaintiff for purposes of the appeal. Only if the undisputed facts or the evidence viewed in the light most favorable to the plaintiff fail to establish a *prima facie* violation of clear constitutional law may we decide that the defendant is entitled to qualified immunity on an interlocutory appeal.

Berryman v. Rieger, 150 F.3d 561, 563 (6th Cir. 1998) (citations omitted).

13. This rule governs because Fourth Amendment prohibitions against "unreasonable seizures," developed below, cannot apply

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of Sacramento v. Lewis, 118 S. Ct. 1708, 1714-21 (1998); *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000). By contrast, an excessive force claim asserted against public servants by a *premeditated target* of official compulsion designed to consummate a seizure are analyzed under Fourth Amendment "reasonableness" strictures; the plaintiff need prove only that the faulted official action was, under the implicated circumstances, objectively "unreasonable." *Graham v. Connor*, 490 U.S. 386, 394-97 (1989); *Tennessee v. Garner*, 471 U.S. 1, 7-9 (1985); *Claybrook*, 199 F.3d at 359.

In the cause *sub judice*, the district court presumed, *for summary judgment purposes*, that Patricia, as a voluntary

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when the plaintiff had not been purposefully "seized" by state lawmen. *See Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000) ("the Fourth Amendment 'reasonableness' standard does not apply to section 1983 claims which seek remuneration for physical injuries *inadvertently inflicted upon an innocent third party* by police officers' use of force while attempting to seize a perpetrator, because the authorities could not 'seize' any person other than one who was a deliberate object of their exertion of force.") (emphasis in original) (*citing Brower v. County of Inyo*, 489 U.S. 593, 596 (1989)).

Similarly, Fourteenth Amendment due process bounds, rather than Fourth Amendment "reasonableness" imperatives, confine exertions of state power which *accidentally* impact even the intended subject of an official seizure, such as where an inadvertent collision with a police vehicle injures an arrest target, because the state agents had not volitionally crafted the violence to facilitate an official seizure. *See County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1715-16 (1998).

cohort of Robert's whom, following the shooting, the defendant officers forcibly removed from the inoperative Chevrolet, and immediately handcuffed, was an intended target of an official seizure at all times pertinent,[14] thereby triggering the Fourth Amendment's comparatively relaxed "objective unreasonableness" standard of proof (and hence the paradigm most favorable to the plaintiff), as juxtaposed against the more exacting "shocks the conscience" evidentiary requisites of the Fourteenth Amendment. On appeal, the defendants-appellants have conceded that their summary judgment motion should be assessed under the Fourth Amendment, rather than the Fourteenth Amendment.[15]

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14. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985) ("Whenever an officer restrains the freedom of a person to walk away, he has *seized* that person.") (emphasis added; citation omitted); *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992) (resolving that an intended arrestee was "seized" by means of a fatal police bullet); *see also Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (ruling that an intended target of an arrest who had been killed by crashing into a police roadblock had been "seized," and commenting that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control."); *Hill v. California*, 401 U.S. 797, 802-05 (1971) (resolving that the plaintiff, an arrestee who had been the victim of mistaken identity, had been "seized" even though the police had intended to confine another man, because the plaintiff nonetheless had been the object of a willful official detention).

15. Accordingly, this review need not resolve whether a factual issue would otherwise exist for trial regarding whether, at the time that Pierce discharged his weapon into the moving Chevrolet's passenger compartment, the defendants intended to seize any passenger in that vehicle other than the driver, which in turn would

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Appendix A

The Supreme Court has defined the boundaries of Fourth Amendment "reasonableness" by adoption of an objective "balancing" query:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. . . . Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, *including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.* . . .
>
> The "reasonableness" of a particular use of force must be judged from the perspective of a

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determine which constitutional proviso would control the plaintiff's charges. *See Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000) (explaining that the constitutional tort action of a citizen who had been inadvertently wounded while inside a parked automobile during a police shoot-out with an armed felony suspect in the parking lot must be scrutinized under Fourteenth Amendment standards because the record proof was uncontested that the defendant peace constables had been unaware that anyone had been inside that vehicle and did not intend to seize anyone who might be inside that car).

> reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.
>
> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively unreasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Graham v. Connor, 490 U.S. 386, 396-97 (1989) (italics and brackets added; citations and quotations omitted).

Although the Fourth Amendment "reasonableness" inquiry is largely fact-driven, summary judgment for defendant public servants founded in qualified immunity is nonetheless appropriate when the undisputed material facts, or the plaintiff's version of disputed material facts, demonstrate that a hypothetical reasonable officer would not have known that his actions, under the circumstances, were objectively unreasonable. *See Sova v. City of Mt. Pleasant*, 142 F.3d 898, 902-03 (6th Cir. 1998). The testimonial record before the instant review, even when construed most favorably for the plaintiff, overwhelmingly manifested that each of the three *Graham* considerations, highlighted above, militated in support

of the incontrovertible conclusion that the defendants' actions were objectively reasonable. First, Robert had committed serious, life-threatening crimes in the presence of the defendant officers. Second, the record proof demonstrated that the fleeing motorist's ongoing felonious misconduct posed an immediate threat to the safety of officers as well as innocent civilians.[16]

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16. As a general proposition, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11. " 'Probable cause' denotes facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense. If the circumstances, viewed objectively, support a finding of probable cause, the arresting officer's actual motives are irrelevant." *Painter v. Robertson*, 185 F.3d 557, 569 (6th Cir. 1999) (quotations and citations omitted).

"Whereas the implicated circumstances comprise factual issues, the ultimate probable cause determination is a mixed issue of law and fact." *Id.* at 570 (citation omitted). Mixed questions of law and fact, and ultimate factual determinations based upon the application of law to subsidiary facts, are subject to plenary ascertainment on appeal. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (*en banc*). Consequently, when the undisputed material facts, or the plaintiff's version of disputed material facts, manifest that a reasonable officer in the defendant's posture would have objectively believed that probable cause existed, the existence of that factor may be determined as a matter of law on summary judgment. *See Painter*, 185 F.3d at 571-72.

In the case in controversy, the testimonial proof, encapsulated herein, would warrant a reasonable officer in Pierce's circumstances to conclude that the culprit posed a serious risk of injury to others,

(Cont'd)

Third, the vehicular perpetrator was actively resisting arrest by eluding representatives of the criminal justice system.[17]

Moreover, an antecedent mandate by this circuit has directly instructed that a constable who fired into the passenger compartment of a moving vehicle, under circumstances remarkably similar to those presently on review, did not violate the Fourth Amendment. In *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), an automobile sped out of a parking lot and violated a posted stop sign. A patrol cruiser followed that vehicle, which culminated in a chase at speeds reaching 90 miles per hour in residential districts. After the violator had twice attempted to collide with the occupied police vehicle, the squad car cornered the fugitive motorist. However, the culprit accelerated his automobile into the lawman's cruiser, and then drove towards the public street. The officer fired a fatal round at the mobile offender. *Id.* at 344. The Sixth Circuit affirmed summary judgment for the shooter, ruling that his actions were constitutionally reasonable as a matter of law.[18] *Id.* at 346-48.

(Cont'd)
which, standing alone, reconciled his use of force with Fourth Amendment strictures.

17. Additionally, the target's persistent high-risk attempts to evade capture created an objectively reasonable suspicion that he may have perpetrated unknown additional serious offenses, thereby reinforcing the weight of the first "reasonableness" factor as supporting Pierce's actions. *See Illinois v. Wardlow*, 120 S. Ct. 673, 675-77 (2000).

18. The *Freland* panel commented:

> [U]nder *Graham [v. Connor, supra]*, we must avoid substituting our personal notions of proper police

(Cont'd)

Appendix A

Accordingly, as a matter of law, defendant Pierce's faulted actions were objectively reasonable, and thus did not violate the Fourth Amendment. Pierce permissibly discharged his professional duty to restore and maintain lawful order through the most effective instrumentality readily available, namely gunfire.[19] Pierce justifiably fired

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(Cont'd)

> procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992) (brackets added).

Despite the instant defendants' timely invocation of *Freland*, and the patent significance of that precedent to the subject action, the trial court inexplicably failed to address it in its judgment denying their qualified immunity motion.

19. As aptly observed by the *Lewis* Court:

> [T]he police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance.

County of Sacramento v. Lewis, 118 S. Ct. 1708, 1720 (1998) (quotations and citations omitted).

at the fleeing vehicle in order to seize its occupant(s); his actions therefore could not violate the Fourth Amendment rights of any unknown passenger who may have been injured by his actions. Thus, Pierce is entitled to qualified immunity because he did not impinge the plaintiff's constitutional rights.

In turn, the remaining two individual defendants, Anderson and Thompson, are likewise shielded by qualified immunity, because their alleged complicity in Pierce's *lawful* use of deadly coercion patently could not offend the plaintiff's Fourth Amendment protections. *See Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997) (explaining that an officer can, under certain circumstances, be deemed personally responsible for *unconstitutional* compulsion applied by a fellow agent if that officer, at minimum, either "(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force.") (citations omitted).

Hence, defendants Pierce, Anderson, and Thompson, as a matter of law, have committed no Fourth Amendment infraction against Patricia Scott,[20] and therefore are insulated

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20. The plaintiff's alternate contention that the defendant officers somehow offended her constitutional privileges by allegedly initiating the high speed chase is facially misconceived, because she had not been injured in an automotive collision or other fortuitous calamity during the chase. *Cf. County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998) (concerning the constitutional claim of the estate of a motorcycle passenger who expired in a vehicular mishap during

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against personal exposure to further litigation under 42 U.S.C. §§ 1983 and 1988.

As previously indicated, the doctrine of qualified immunity safeguards only certain *natural person* defendants in their individual capacities. *E.g. Painter*, 185 F.3d at 566 n.12. By contrast, if the legal requirements of *municipal* or *county* civil rights liability are satisfied,[21] qualified immunity

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a high speed police chase). Rather, as illustrated herein, the salient issue was whether Pierce was constitutionally authorized, under the circumstances, to shoot at the errant Chevrolet in an attempt to end its endangerment of peace officers and civilians. Whether Robert would have driven the Chevrolet less hazardously if the defendants had not pursued it, which in turn may have mitigated or eliminated the ultimate need for firepower to disable that vehicle, is entirely irrelevant, because Robert in no event possessed any legal justification or excuse for his felonious life-threatening operation of the Chevrolet. As the Seventh Circuit has commented:

> Other than random attacks, all such cases [involving the use of force by criminal justice personnel] begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994). *See also Claybrook v. Birchwell*, 199 F.3d 350, 360 n.13 (6th 2000).

21. Municipalities and counties are "persons" exposed to litigation under sections 1983 and 1988, if the legal requisites are
(Cont'd)

will not automatically excuse a municipality or county from constitutional liability, even where the municipal or county actors were personally absolved by qualified immunity, if those agents in fact had invaded the plaintiff's constitutional rights. *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 166-67 (1993); *Garner v. Memphis Police Dept.*, 8 F.3d 358, 365 (6th Cir. 1993). "An official capacity claim filed against a public employee is equivalent to a lawsuit directed against the public entity which that agent represents." *Claybrook*, 199 F.3d at 355 n.4 (*citing Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). Accordingly, despite the dismissal of Anderson, Pierce, and Thompson in their personal capacities, a procedurally proper case has been stated against defendant Clay County, Tennessee, by virtue of the plaintiff's specification, in her complaint, that Clay County, as well as the three defendant county agents in their official capacities, infringed her constitutional rights.

(Cont'd)
fulfilled. *Mumford v. Basinski*, 105 F.3d 264, 267 (6th Cir. 1997). *See, e.g., Haverstick Enterprises v. Financial Federal Credit*, 32 F.3d 989, 996 n.8 (6th Cir. 1994) ("section 1983 actions against municipalities [or counties] carry certain special elements, including proof (1) that the City [or county] pursued an official custom or policy of failing to adequately train, supervise, or discipline its officers in a particular matter, and (2) that such official policy or custom was adopted by the official makers of policy with 'deliberate indifference' towards the constitutional rights of persons affected by the policy or custom.") (brackets added) (*citing City of Canton v. Harris*, 489 U.S. 378, 387-88 (1989)). *See also Collins v. City of Harker Heights*, 503 U.S. 115, 120-24 (1992); *Monell v. Department of Social Services*, 436 U.S. 658, 690-95 (1978).

Nevertheless, our conclusion that no officer-defendant had deprived the plaintiff of any constitutional right *a fortiori* defeats the claim against the County as well. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (*per curiam*) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of unconstitutionally excessive force is quite beside the point.") (emphasis the Court's); *Monday v. Oullette*, 118 F.3d 1099, 1105 (6th Cir. 1997). *Ergo*, this court, in its discretionary exercise of pendent party appellate jurisdiction over the appellant Clay County, further directs that the plaintiff's federal claims against it shall be dismissed.[22] *See Brennan v. Township of Northville*, 78 F.3d 1152, 1157-58 (6th Cir. 1996).

Finally, following remand, the district court shall initially determine, in its sound discretion, whether to dismiss the plaintiff's remaining state law claims without prejudice, or to exercise supplemental federal jurisdiction over them. 28 U.S.C. § 1367(a) & (c)(3); *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 348-50 (1988); *Rosado v. Wyman*,

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22. Even if this review had declined to exercise its discretionary pendent party jurisdiction over the County, its ruling that none of the three individual defendants had violated any constitutional right of the plaintiff would constitute the law of the case which, under the mandate rule, would compel the district court, following remand, also to dismiss the federal claims against the County. *See* 28 U.S.C. § 2106; *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978); *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994); *In re General Motors Corp.*, 3 F.3d 980, 984 n.2 (6th Cir. 1993); *Guidry v. Sheet Metal Wkrs. Intern. Ass'n*, 10 F.3d 700, 705-06 (10th Cir. 1993); *Piambino v. Bailey*, 757 F.2d 1112, 1119-20 (11th Cir. 1985).

397 U.S. 397, 403-05 (1970); *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1254-55 (6th Cir. 1996).

This reviewing court has carefully considered each argument submitted by the plaintiff, but finds none persuasive, either individually or collectively. Accordingly, the district court's order of July 28, 1998 denying qualified immunity to defendants Anderson, Pierce, and Thompson is **REVERSED**. All claims against all defendants anchored in 42 U.S.C. §§ 1983 and 1988 are **DISMISSED WITH PREJUDICE**. This case is **REMANDED** to the district court for such necessary further orders and proceedings as are consistent with this opinion, including disposition of the plaintiff's pendent state law claims.

Appendix A

DISSENT

CLAY, Circuit Judge, dissenting. I respectfully dissent for the reasons set out in the district court's well-reasoned and persuasive opinion denying Defendants' motion for summary judgment. I believe the district court was correct in finding that Defendants are not immune from suit.

Contrary to the representations of the majority opinion, this is a case in which factual disputes, which should preclude the granting of summary judgment, abound. In my opinion, the majority, contrary to the well-established dictates of law governing the granting of summary judgment, can only arrive at its conclusion that there are no factual disputes by deciding all of the contested issues of fact against Plaintiff. Not only does the majority opinion assert disputed facts to constitute undisputed facts, but in its anxiousness to deny Plaintiff her day in court, the majority reaches some of its factual conclusions by stating, as objectively established facts, what the majority supposes was in the minds of the deputies at the time of the events surrounding the shooting. The deputies' explanation for their conduct, much of which could be viewed in the context of the factual circumstances to constitute after the fact speculation about the motivation of the officers, is asserted as uncontrovertibly true by the majority. Such determinations would best be left to the finder of fact at the time of trial.

Plaintiff and the officers have described vastly conflicting versions of what occurred on the evening of April 28, 1995. What is missing from the one-sided account of the events described by the majority opinion is any consideration

of Plaintiff's allegations or version of the events. This case presents questions of whether the deputies acted reasonably in pursuing an individual who had allegedly initially committed a minor traffic violation; whether the deputies embellished or exaggerated their version of the events which subsequently occurred during the chase and the shooting; whether the deputies observed Plaintiff riding as a passenger in the vehicle and fired at her, or for that matter, whether the officers observed both the driver and the passenger and fired at both of them in disregard for the rights and safety of Plaintiff; and whether excessive force was used against Plaintiff by shooting at her and effectuating a "seizure" of her person for purposes of the Fourth Amendment. *See Tennessee v. Garner*, 471 U.S. 1, 16-17 (1985).

As indicated by the district court's opinion in this matter, the officers were in touch with one another by radio throughout the chase and the shooting. Rather than resolve all of the inferences that could be drawn from the contested facts and circumstances in favor of Plaintiff, as the Court is required to do on a motion for summary judgment, the majority has improperly undertaken in its opinion to resolve against Plaintiff all the issues of whether Defendants acted with excessive force and violated Plaintiff's clearly established rights. In so doing, the majority has also resolved against Plaintiff the issues of whether Defendants observed or had reason to know that excessive force would be or was about to be employed, or whether Defendants had the opportunity and means to prevent the harm to Plaintiff. Again, those issues should have been left for resolution at trial.

This Plaintiff, who suffered grievous personal injury and harm in the incident which is the subject of this litigation, should have been permitted to subject the officers' testimony to the truth seeking device of cross-examination at trial, and should have been afforded the opportunity to present direct and circumstantial evidence from which Plaintiff could argue to the court and jury that her clearly established constitutional rights were violated by what constituted, under the circumstances, the officers' excessive use of force for which one or more of Defendants were not entitled to the benefits of qualified immunity.

The majority asserts that because Plaintiff has argued violations of her rights under the Fourth Amendment and not the violation of her substantive due process rights under the Fourteenth Amendment, the lesser standard of "objective unreasonableness" should apply. The granting of summary judgment under the circumstances of this case is improper regardless of whether the standard that should be applied in evaluating the officers' conduct is the "conscience shocking" standard of the Fourteenth Amendment, *see County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 1717 (1998), or the lesser standard of "objective unreasonableness" of the Fourth Amendment. *See Garner*, 471 U.S. at 16-17; *see also Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000). Regardless of the appropriate standard, Defendants do not dispute, as made clear by the district court's opinion, that Plaintiff's right to be free from excessive force under the Fourth Amendment was a clearly established right at the time of the incident in question. The question that should have been left for trial was whether excessive force was actually employed against Plaintiff.

This Circuit's unfortunate practice of arrogating unto itself the role of resolving on appeal the factual disputes presented by a qualified immunity defense in a § 1983 action, as represented by the majority opinion herein, continues the troubling trend followed by this Court in the improperly decided case of *Claybrook v. Birchwell*. *See* 199 F.3d at 358-61 (affirming the district court's order granting summary judgment to the defendants on Counts III and IV of the plaintiffs' complaint). I therefore dissent.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NORTHEASTERN DIVISION DATED AND ENTERED JULY 28, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

2:95-0095

PATRICIA SCOTT,

v.

CHINN ANDERSON, individually and in his official capacity as Sheriff of Clay County, Tennessee; BILLY PIERCE and MICHAEL THOMPSON, individually and in their official capacities as Deputy Sheriffs of Clay County, Tennessee; CLAY COUNTY, TENNESSEE.

MEMORANDUM

Before the Court is the defendants' motion for summary judgment. For the reasons set forth below, the Court DENIES the defendants' motion.

I. Relevant Background

In the evening of April 28, 1995, the plaintiff, Patricia Scott, was a passenger in a car that her then ex-husband, Robert Scott, was driving. Mr. Scott did not have a valid driver's license at the time. When he failed to stop at a stop

sign, defendant Michael Thompson began to follow the Scott vehicle. The parties dispute the point at which Deputy Thompson turned on his blue lights. Mr. Scott tried to elude Deputy Thompson, and began to speed within an estimated range of 85 to 100 miles per hour. As Deputy Thompson's curiosity increased, he continued to follow the Scott vehicle. Deputy Billy Pierce and Sheriff Chinn Anderson, both defendants, ultimately joined the chase which lasted over 20 minutes.

According to the defendants, Mr. Scott attempted to run over Sheriff Anderson who was standing outside of his patrol car, missing him by only inches. Mr. Scott admits that during the chase he forced an oncoming civilian passenger vehicle off of the road by flashing his headlights at the oncoming car. The defendants claim that Mr. Scott ran into Deputy Pierce's car; the plaintiff claims that Deputy Pierce collided into the Scott vehicle. At this point, Mr. Scott attempted to leave the scene when Deputy Pierce exited his vehicle and fired nine shots from his weapon. Deputy Pierce shot five bullets into the back of the Scott car, allegedly aiming at the driver. He then fired four shots toward the ground, aiming at the tires. Deputy Pierce got out of the way of the Scott vehicle and thereafter fired his weapon. Finally, Mr. Scott's vehicle came to a stop.

It is undisputed that two of the shots that Deputy Pierce fired hit Ms. Scott and that none of the bullets hit Mr. Scott. One bullet lodged in her head and the other lodged in her shoulder. Ms. Scott was flown to Vanderbilt Hospital and was diagnosed with subdural hematoma and intracranial hemorrhage, and an open right humerus to the shoulder. She

claims also to have suffered seizures, mild left hemiparesis, cardiopulmonary arrest, and cerebral edema and herniation while hospitalized. She states that the bullet lodged in her head cannot be removed due to its location.[1]

Deputy Pierce claims that he shot at the Scott vehicle because Mr. Scott allegedly had tried to run over Sheriff Anderson, had rammed Deputy Pierce's vehicle, had tried to run over Deputy Pierce, and had tried to escape to a road where other people would allegedly be endangered by his actions. Deputy Pierce stated that he did not know who was in the car, and did not know that any passengers were in the car.

Proof before the Court indicates that the defendants communicated to each other over radios throughout the entire incident. Sheriff Anderson gave instructions to the deputies, and the defendants informed each other of their own locations and actions, as well as those of Mr. Scott. The record also indicates that Deputy Pierce was not alone when he fired the bullets into the Scott vehicle, and that Deputy Thompson may have witnessed Deputy Pierce draw his gun before shooting it at the Scott vehicle.

The plaintiff claims that the Clay County Sheriff's Department had practices and procedures which Sheriff Anderson ratified and which endorsed Deputy Pierce's action. The plaintiff claims that the defendants seized her and did so with excessive force. The defendants assert that

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1. The plaintiff claims that the defendants pulled her from the car, threw her to the ground, and handcuffed her.

they have followed both state and federal laws, and that even if they failed to follow the law, they are protected under qualified immunity. The plaintiff asserts that the defendants have caused her to suffer physical damage, emotional distress, pain, loss of enjoyment of life, and loss of potential work and income. She asserts that she has had to incur medical and hospital expenses and that she has suffered permanent impairment to her body and mind. She seeks ten million dollars in compensatory damages, and five million dollars in punitive damages.

II. Law and Analysis

The plaintiff brings her claim under 42 U.S.C. §§ 1983 and 1988, claiming constitutional violations of the Fourth, Fifth, and Fourteenth Amendments. The plaintiff also asserts pendent state law claims, namely that the defendants violated Sections 13 and 16 of Article 1 of the Tennessee Constitution, and that the defendants committed torts of assault and battery, aggravated assault, attempted murder, and outrageous conduct. Jurisdiction before this Court is proper pursuant to 28 U.S.C. §§ 1331 and 1343.

A. Summary Judgment Standard

Summary judgment is appropriate only when there is no genuine issue of material fact and when the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-80 (6th Cir. 1989). The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323. In responding to a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Id.* To defeat a defense of qualified immunity in a summary judgment motion, a party may rely on both direct and circumstantial proof. *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 152 (6th Cir. 1995).

The Supreme Court concluded in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), that a dispute about a material fact is "genuine" within the meaning of Rule 56 of the Federal Rules of Civil Procedure only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient." *Id.* at 252. Of course, the Court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the nonmoving party. *Id.* at 255.

B. Fourth and Fourteenth Amendments

The Supreme Court has explained that the first step in any § 1983 action is to determine "the exact contours of the underlying right" which the plaintiff claims the defendants violated. *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 n.5 (1998) (quoting *Graham v. Connor*, 490 U.S. 386, 394 (1998)). Where defendants raise the defense of qualified immunity, courts should first determine whether the plaintiff has alleged the deprivation of a constitutional right at all. *Id.* The Supreme Court in *Lewis* repeated its common instruction that, "if a constitutional claim is covered by a

specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Id.* at 1715 (quoting *United States v. Lanier*, 117 S. Ct. 1219, 1228, n.7 (1997)). Because Fourth Amendment analysis is proper here, as explained below, Fourteenth Amendment substantive due process analysis is inappropriate.[2] *Id.*

The plaintiffs in *Lewis* were the parents of Philip Lewis who died after being thrown off the passenger seat of a motorcycle followed by the police in a high-speed chase. *Id.* at 1712. The driver of the motorcycle, Brian Willard, caught the attention of the police when he drove past the police at a high speed. *Id.* The police began to follow the motorcycle, reaching speeds of up to 100 miles per hour. *Id.* Willard lost control of the motorcycle as he tried to make a sharp turn, and both Willard and Lewis were thrown from the motorcycle. *Id.* Willard made it to safety, but Lewis remained in the street and was run over by the police. *Id.* Lewis was dead at the scene. *Id.* The Supreme Court found that the police's action did not constitute a seizure of Lewis, and that the Fourth Amendment therefore did not apply. *Id.* at 1715.

In the instant case, the facts are similar to *Lewis* up to a point. Like Lewis, Ms. Scott was a passenger and not the

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2. Similarly, analysis under the Fifth Amendment is inappropriate. First, the Court's analysis of the plaintiff's claim under the Fourth Amendment precludes Fifth Amendment substantive due process analysis. And second, the Fifth Amendment governs constitutional violations by federal actors; not violations by state actors, as alleged here.

driver of the vehicle. In both cases, the police began following the suspects after minor traffic violations. And the drivers in both cases drove at extremely high speeds. Eventually, both passengers were severely injured — Lewis to the point of death. But it is at that point that the similarities end.

In the instant case, the police seized the plaintiff when they intentionally shot at the Scott vehicle. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (holding that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirements of the Fourth Amendment."). In *Brower v. County of Inyo*, 489 U.S. 593 (1989), the police set up a roadblock to force the plaintiff to end his high-speed chase. *Id.* at 594. The Supreme Court held that the police's action of setting up a roadblock constituted a seizure for purposes of the Fourth Amendment because the police there exercised an "intentional acquisition of physical control." *Id.* at 596. The Court stated that, "A seizure occurs even when an unintended person or thing is the object of the detention or taking, . . . but the detention or taking itself must be wilful." *Id.* In discussing *Brower*, the Sixth Circuit explained that, "[b]ecause the police roadblock was intentionally applied and did terminate the decedent's freedom of movement, the plaintiffs alleged a fourth amendment 'seizure.' " *Pleasant v. Zamieski*, 895 F.2d 272, 277 (6th Cir. 1990). Similarly, in this case (1) the defendants intentionally fired nine shots at the Scott vehicle and (2) that action terminated Ms. Scott's freedom of movement.

The Court thus finds that the defendants' conduct amounted to a seizure as defined by the Fourth Amendment.

"It is the province of the jury, not the court, to decide on the credibility of the defendant's account of the need for force." *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994), *quoted in Secot v. City of Sterling Heights*, 985 F. Supp. 715 (E.D. Mich. 1997). "[R]easonableness depends on not only when a seizure is made, but also how it is carried out." *Garner*, 471 U.S. at 8 (citing *United States v. Oritz*, 422 U.S. 891, 895 (1975)). Because there are genuine issues of whether the defendants' seizure was reasonable, the Court will leave that question of material fact for the jury to decide.

C. Qualified Immunity

The defendants assert that they committed no constitutional violations, but if they did, they are immune to suit because they possess qualified immunity. The Court disagrees.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

> It is not necessary that the very action have been previously hold unlawful but, given the preexisting law, the unlawfulness of the conduct must have been apparent. In determining whether an official is entitled to qualified immunity, this court asks whether the law was clearly established at the time of the alleged action.

Barton v. Norrod, 106 F.3d 1289, 1293 (6th Cir. 1997). The Sixth Circuit has held that the method of determining whether the officers should have known that their action was unlawful is to look primarily to decisions of the Supreme Court, the Sixth Circuit, and district courts within our circuit. *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992).

In the Sixth Circuit to defeat a motion for summary judgment based on a defense of qualified immunity, the plaintiff must first sufficiently allege that the defendants violated clearly established law, and second present sufficient evidence to create a genuine issue as to whether the defendants committed the acts that violated the law. *Adams*, 31 F.3d at 386; *Secot*, 985 F. Supp. at 720.

In the present case, the plaintiff claims that all three defendant officers violated the plaintiff's Fourth Amendment right to be free from excessive force. The plaintiff claims that Deputy Pierce actively participated in the use of excessive force; that Deputy Thompson owed her a duty of protection against the use of excessive force; and that Sheriff Anderson both owed the plaintiff a duty of protection and supervised Deputy Pierce in his use of excessive force.

The defendants do not dispute that the right to be free from excessive force under the Fourth Amendment was a clearly established right at the time of the incident at issue. *Adams*, 31 F.3d at 386-87 (citing *Graham v. Conor*, 490 U.S. 386, 392-93 (1989)). "Our cases teach that, in order to hold Officer Scott liable for the use of excessive force, [the plaintiff] must prove that [the officers] (1) actively participated in the use of excessive force, (2) supervised the

officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force." *Turner v. Scott*, 199 F.3d 425 (6th Cir. 1997) (citing cases including *Walton v. City of Southfield*, 995 F.2d 1331, 1340 (6th Cir. 1993). Both the first and second categories of liability for use of excessive force are plain on their face. The third category is less clear, and deserves explanation.

> It is clear that there are circumstances under which police officers can be held liable for failure to protect a person from the use of excessive force. . . . Generally speaking, a police officer who falls to act to prevent the use of excessive force may be hold liable when (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring.

Turner, 119 F.3d at 429. This law was clearly established at the time of the incident in question. *E.g., Adams*, 31 F.3d at 386. Although neither party contests the fact that the law in this area was clearly established by April 28, 1995, "[t]he fact that the law may have been unclear, or even hotly disputed, at the margins does not afford state actors immunity from suit where their actions violate the heartland of the [right], as that [right] was understood at the time of the violation." *Stemler v. City of Florence*, 126 F.3d 856, 867 (6th Cir. 1997) (discussing the Due Process Clause of the Fourteenth Amendment).

Additionally, the Court finds that the plaintiff has met her burden through presentation of facts in her sworn

complaint and in deposition testimony, and can overcome the defense that, as a matter of law, the defendants are entitled to qualified immunity. *E.g., Adams*, 31 F.3d at 386. There is no dispute that Deputy Pierce fired four out of nine bullets into the back of the Scott vehicle, seriously injuring the plaintiff, Ms. Scott. *E.g., id.* Further proof indicates that Deputy Pierce was in risk of no personal danger when he fired his rifle, and that he stopped the Scott car with bullets to the tires only after shooting four shots inside the back window. Finally, the plaintiff has presented proof that Deputy Thompson and Sheriff Anderson may have been in constant communication with Deputy Pierce, that they knew he was willing to do anything to stop the Scott vehicle, that they knew he had drawn his rifle (whether by listening over their radios, or by witnessing it first hand), and that they could have stopped him from firing his rifle at the Scott vehicle.[3] *E.g., id.*

Summary judgment based on a qualified immunity defense is not appropriate in a § 1983 action "if there is a factual dispute (i.e. a genuine issue of material fact) involving an issue on which the question of immunity turns. . . ." *Poe v. Haydon*, 853 F.2d 418, 426 (6th Cir. 1988); *see also Brandenburg v. Cureton*, 882 F.2d 211 (6th Cir. 1989); *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir. 1991). Because such a question of material fact exists in the instant case, the Court holds that the defendant officers in their individual capacities are not entitled to qualified immunity.

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3. Interestingly, the defendants presented no proof that Mr. Scott would have continued his high-speed escape (thus endangering civilians) had the defendants ended their chase.

Appendix B

The Tennessee Governmental Tort Liability Act ("GTLA"), Tenn. Code Ann. § 29-20-101 (1997), provides immunity to counties or to officers in their official capacity for negligence actions. Because the plaintiff's complaint alleges intent rather than negligence, this action is governed instead by Tenn. Code Ann. § 8-8-301-303. *Hensley v. Fowler*, 920 S.W.2d 649, 651-52 (Tenn. Ct. App. 1995). "No sheriff . . . shall be liable for any wrongs, injuries, losses, damages or expenses incurred as a result of any act or failure to act *on the part of any deputy* appointed by the sheriff, whether the deputy is acting by virtue of office, under color of office or otherwise." § 8-8-301 (emphasis added). However, the statute makes no mention of the sheriff's immunity for *his own* actions. This Court has found no authority extending the sheriff's absolute immunity to his own actions, but only to the actions of his deputies. If Sheriff Anderson supervised Pierce's excessive force, or if Anderson had a duty to protect the plaintiff against excessive force, he is not immune in his official capacity. The statute does not grant immunity to follow deputies. And it specifically states that counties are not immune to suit for the actions of deputies. § 8-8-302.

Accordingly, the Court finds that Clay County is not immune from suit; Deputies Thompson and Pierce are not immune from suit in their official capacities; and Sheriff Anderson is not immune from suit in his official capacity for his own actions.

Appendix B

III. Conclusion

For the foregoing reasons, the Court DENIES the defendants' motion for summary judgment.

An appropriate order shall enter.

s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
Senior United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

2:95-0095

PATRICIA SCOTT,

v.

CHINN ANDERSON, individually and in his official capacity as Sheriff of Clay County, Tennessee; BILLY PIERCE and MICHAEL THOMPSON, individually and in their official capacities as Deputy Sheriffs of Clay County, Tennessee; CLAY COUNTY, TENNESSEE.

ORDER

For the reasons stated in the accompanying memorandum, the Court DENIES the defendants' motion for summary judgment.

It is so ORDERED.

s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
Senior United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 13, 2000

98-6157

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA SCOTT,

Plaintiff-Appellee,

v.

CLAY COUNTY, TENNESSEE, ET AL.,

Defendants-Appellants.

ORDER

BEFORE: KRUPANSKY, BOGGS, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk